IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1295508-D1 AND ALL OTHER SEAMAN'S DOCUMENTS

Issued to: Ruben PADILLA

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1980

Ruben PADILLA

This appeal has been taken in accordance with Title 46 United States code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 22 December 1970, an Administrative Law Judge of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for six months on eighteen months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as a Bedroom Messman on board SS ROBIN GOODFELLOW under authority of the document above captioned, on or about 24 May 1970, Appellant wrongfully struck Walter L. McBride, a fellow crewmember, with his fists while said vessel was at Poro Point, San Fernando, La Anion, R. P.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of a witness, and a Consular report.

In defense, Appellant offered in evidence his own testimony, that of another witness and some medical reports.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved and then entered an order suspending all documents issued to Appellant for a period of six months on eighteen months' probation.

The entire decision was served on 15 January 1971. Appeal was timely filed on 4 February 1971 and perfected on 24 May 1971.

FINDINGS OF FACT

On 24 May 1970, Appellant was serving as a Bedroom Messman on board SS ROBIN GOODFELLOW and acting under authority of his document. Because of the disposition to be made of this case no further findings are needed.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

(1) Exhibit B, a copy of a Consul's report should not have been admitted into evidence;

(2) testimony of the Chief Mate should be stricken because full cross-examination of the witness was denied to Appellant; and

(3) the testimony of the witness, McBride, should have been disregarded as unworthy of belief.

APPEARANCE: Klein & Sterling, by Walter J. Klein, Esq.

OPINION

I

Initially, it should be noted that the entire procedure followed in taking and introducing into evidence the deposition of Walter L. McBride, the alleged victim of Appellant's assault, was highly irregular. It was apparently done in a manner agreed upon by all parties concerned, but these arrangements are not reflected in the record and this is error. In this case it is harmless error since these transactions were subsequently ratified; however, this type of off-the-record transaction is an open invitation to reversal.

II

Turning to matters concerned with the single specification found proved out of the four originally preferred, I would like to speak first to Appellant's claim that he was denied complete cross-examination of the first witness to appear before the Administrative Law Judge, the Chief Mate of the vessel.

The testimony of the Mate tended principally to prove that Appellant was intoxicated on 24 May 1970. The specification alleging intoxication was the one dismissed sua sponte by the Administrative Law Judge on the grounds that the specification did not allege an offense. This testimony was used by the Judge, however, to find that Appellant was in fact intoxicated at the time so as to undermine Appellant's credibility as to his testimony about the offense found proved. There is no inconsistency in holding that a specification dealing with intoxication does not state an offense and at the same time holding that intoxication was established as a fact in order to undermine the credibility of Appellant's testimony on another matter occurring at the same time. If this were all, there would be no problem.

The Chief Mate testified that he saw Appellant returning to the ship just prior to the altercation in a condition which led him to conclude that Appellant was intoxicated. Later, after the altercation the Chief Mate encountered Appellant and his observation at that time confirmed his impression that Appellant was intoxicated.

On cross-examination he denied participation in entering the events of 24 May in the official ship's log. Appellant's Counsel then complained that he could not complete his cross-examination without seeing the log, which the Investigating Officer stated was "still in Mobile" and thus unavailable. When counsel protested twice that there had been ample time to get the log to New York for the hearing, the Judge said:

> "I will tell him (the Investigating Officer) to get the official log book. But I don't think it will frustrate you, because the witness said that he doesn't recall, and he further went on to say that the entry was made in the American Consul's office." R-45. This begs the question because it assumes that what the witness said was true and that access to the log would only confirm his testimony. As will be seen in a moment, the truth was later demonstrated to be otherwise.

It is true that Counsel ultimately consented to the excusal of the witness (R-48), but I am not inclined to insist on a harsh theory of waiver in view of the Investigating Officer's failure to offer any explanation as to why the official log was still in Mobile, the Administrative Law Judge's apparent reluctance to order the production of the log, and subsequent findings.

The official log never was produced at the hearing. In 27 August 1970, the Investigating Officer offered in evidence and the Administrative Law Judge received into evidence, a report, dated 26 May 1970, of the Consul in Manila. The third enclosure to the report includes a copy of an entry on page 27 of the official log of the vessel, certified to be a true copy by the Coast Guard Merchant Marine Detail Officer in Manila, dealing with the events of 24 May 1970, as of departure from Poro Point, the day before the vessel arrived at Manila, and it is signed by the Chief Mate. There is no doubt that had this document been available when the Chief Mate was on the stand on 23 July the cross-examination would have been more effective and telling. I am concerned that the judge does not even mention this matter in his opinion. It was neither conclusively established nor denied that the Investigating Officer had the document in his possession on 23 July, but the record leaves the Investigating Officer vulnerable to the impeachment. In fact, the Investigating Officer's lack of concern that the log was "still in Mobile" on 23 July, when it was apparently his intent to prove two of the original specifications by the use of a log entry only, would indicate that he already had an admissible copy of that log entry available to him without having to call for the original document. This, of course, was the copy enclosed with the Consul's report.

I do not specifically condemn what was done here in the absence of a full inquiry into the tactics involved and the reasons therefore,but I refuse to speculate to the prejudice of Appellant that some justifiable cause might exist.

III

Appellant argues that insofar as the Judge's findings are based exclusively on the testimony of McBride the normal rule that evaluation of credibility is a function of the trier of facts does not apply since the testimony was taken by deposition and the Judge was in no better position than I to evaluate the credibility of the deposition record. I am inclined to agree, with the caveat that when an Administrative Law Judge's evaluation of deposition testimony's credibility is influenced by corroborative evidence I will not arbitrarily reject his evaluation. It is then necessary to examine the other evidence to determine whether it corroborates McBride's testimony.

IV

The testimony of the Chief Mate does not bear upon the merits of the case. When he arrived at the scene of the fracas, the episode was over and Appellant was not even there.

The official log book entry is absolutely unreliable for several reasons. It recites that the Chief Mate "was summoned to #4 Hatch" to break up an altercation. The Chief Mate's testimony shows clearly that the reference to "#4 Hatch" in the log is wrong. When the Chief Mate was at "#4 Hatch" the altercation was already over and the Mate was being summoned to the Master's office.

Although the official log entry might have been given some weight as a record made in the regular course of business, its reliability in that area is impugned by the fact that the witness to the entry both denied and failed to recall that such an entry was made and was never confronted with the document which he had signed.

When the log recounts that Appellant "had to be restrained" it is unsupported by other testimony. The log specifically shuts out a theory that it was based on a Master's investigation, because the Master stated his intention to investigate after the vessel should have arrived at Manila.

Of course, the failure to apprize Appellant of this log entry, made on the date of the alleged offense, deprives it of any preferred status as an entry made in substantial compliance with statute, but, for purposes of the "record made in the regular course of business" rule the probative value of this entry is completely demolished.

Controlling as to its probative value is the fact that the log entry recounts only an "altercation" between two men. It does not mention a blow struck by anyone. It does not tend to prove that Appellant struck McBride as alleged in the specification.

I recognize that the report of the Consul himself speaks of "assault." The words used are, "He was also logged on May 24, 1970 for assaulting a fellow crewmember, galley utilityman Walter L. McBride." The Consul's report is of no probative value since the log entry most definitely did not record that Appellant had assaulted anyone, or even struck anyone at any time or place.

Insofar as the testimony of McBride is concerned, it is obvious that there is not a shred of corroboration anywhere in the record.

I conclude, therefore, that Appellant is correct in his assertion that I am in a position to reevaluate McBride's deposition testimony since it is the only evidence which tends to support the Judge's findings and the Judge was in no better position than I to determine credibility.

V

I find McBride's testimony inherently incredible so as to render it insufficient to provide, without more, a basis for the Administrative Law Judge's findings. McBride was certain that the vessel was at anchor and not moored to a pier or wharf. If the Chief Mate's testimony was not completely undermined by his "log entry" recollections, and is to be believed at all, the vessel was definitely moored to a shore side installation.

As to discrepancies in McBride's testimony the Judge discusses only one, when McBride testified that he had dealings with Appellant on board about five days after the event in question while the record shows conclusively that Appellant was separated from the vessel the very next day. The Judge found no fundamental credibility fault with this; but he does not discuss at all the flat contradiction about the location of the vessel at the time of the alleged assault.

VI

The Administrative Law Judge may have correctly rejected Appellant's testimony (and, incidentally that of another seaman who testified in behalf of Appellant, although the record does not give any clue as to why this other seaman's testimony should have been rejected) about what happened, on the grounds that he believed that Appellant was intoxicated at the time of the alleged events and, therefore, was not a reliable witness as to what occurred.

The mere rejection of testimony of a person charged does not tend to prove the truth of the allegations lodged against him. The burden still is upon the Investigating Officer to provide the requisite evidence upon which to predicate findings. I do not think that it was provided in this case. See Decision on Appeal No. 894.

VII

Appellant's first complaint on appeal, that the Consular report should not have been admitted into evidence, must be summarily rejected. The report was admissible under 28 U.S.C. 1740 and 46 CFR 137.20-115. The enclosures to the report were admissible on the same basis. The matter of weight to be assigned is different from the admissibility of the document. The question of weight has been disposed of herein.

VIII

One other point should be noted. Appellant requested a subpoena duces tecum from the Administrative Law Judge for four items including: "All statements taken or received by said ship owner in connection with the incidents of May 21 and May 24, 1970." The Administrative Law Judge denied the request for these items on the grounds that they were in the nature of a discovery motion and he had no power to order discovery. It may well be that there is a no authorization for "discovery" in administrative procedure statutes; however, here we are not talking about discovery. The rules for discovery are applicable to situations where one party may be forced to disclose information to another before trial. Discovery has no relevance to an application to compel a non-party witness to produce a record at the hearing. Therefore, the Administrative Law Judge's reliance on the theory of "discovery rules" was not well founded and would require at least a remand if the totality of the record did not make the flat dismissal of the charge appropriate.

CONCLUSION

The record in this case does not provide evidence of the requisite quality to support the one relevant finding of fact made by the Judge, after efforts had been made to prove four different offenses by Appellant. The charges must be dismissed.

ORDER

The order of the Administrative Law Judge dated at New York, New York, on 22 December 1970, is VACATED. The charges are DISMISSED.

T. R. Sargent
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 27th day of July 1973.

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